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BORKUM ISLAND TRAGEDY AND TRIAL

MAXIMILIAN KOESSLER

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I. INTRODUCTION AND BACKGROUND

The Borkum Island case¹ was one of the most interesting among those American war crimes cases which were tried outside Nuremberg.² The trial was conducted in the German town of Ludwigsburg, near Stuttgart, and lasted from February 6 to March 22, 1946. It was the judicial aftermath of the tragedy of seven American airmen who upon the crashlanding of their plane on the German North Sea island of Borkum surrendered there as prisoners of war, were immediately thereafter exposed to a cruel ordeal, and finally murdered, all this in the course of a single day. Its coverage in a German pamphlet is mostly based on hearsay and colored by the attempt to euologize one of the defendants who were sentenced to death and executed.³ The present paper attempts an objective account the main source of which is the official record.⁴

The background of the Borkum island incident was the policy of the Nazi regime to encourage lynch acts against Allied fliers falling into German hands.⁵ A semi-official announcement of that policy was made by an article published in the Nazi party gazette *Der Voelkische Beobachter* under the byline of propaganda minister Dr. Goebbels.⁶ It characterized the Allied bombing of German cities as criminal terror actions, and then went on to say:⁷ "The German people, whose high regard for proper methods of warfare is known throughout the world, are infuriated by those cynical crimes. Only by the force of arms could they be prevented from lynch-

¹ Officially styled: United States v Kurt Goebell et al.

² KOESSLER, *War Crimes Trials in Europe*, 39 GEORGETOWN LAW JOUR., pp. 18-112.

³ HAMMERSTEIN, LANDSBERG HENKER DES RECHTS? (Landberg Executioners of the Law?), Wuppertal, Germany, 1952 (written in memoriam of the defendant Wentzel).

⁴ Trial transcript, totalling 1286 typewritten pages, available for inspection at the war crimes division of the U. S. Department of the Army.

⁵ TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL IN NUREMBERG, Vol. I. pp. 229, 292, 340; and official transcripts (mimeographed) U.S. v Alstoetter et al. (Justice case), pp. 10804-10810; U.S. v Weizsaecker et al. (Ministries case), pp. 28245-28249; U.S. v Leeb et al. (High Command case), pp. 10281-10286.

⁶ German text in TRIAL OF MAJOR WAR CRIMINALS, op. cit. supra note 5, Vol. XXVIII, pp. 436-439.

⁷ The following paragraph is a condensed translation of corresponding passages in Goebbels' article.

ing enemy airmen falling into their hands. But German police or military cannot, and must not, prevent Germans from giving the deserved treatment to those who murder innocent children. And no plea of superior order can be rightly made on behalf of those enemy airmen. There is no law of war that would allow a soldier who is guilty of an infamous crime to escape punishment therefor because, in perpetrating it, he obeyed an order flagrantly inconsistent with morality and international custom."

It is obvious that despite the highly unsettled state of international law on the legitimate scope of aerial bombardment,⁸ and the vague confines of the doctrine of legitimate reprisal,⁹ reprisal was a most spurious pretext for that swastika "crusade" so flagrantly violative of the duty, under international law, to protect prisoners of war,¹⁰ and especially of the specific prohibition, by the Geneva Convention, of reprisals against prisoners of war.¹¹ The fact remains, however, that Goebbels' article was effective in inspiring numerous atrocities against captive Allied fliers, and that it was the red light for that incident which is the subject of this paper. Most significantly, the dramatis personae of the Borkum island tragedy, when speaking of Goebbels' article, called it the "decree" of Dr. Goebbels, thus attributing to it the character of an order.

II. SUMMARY OF THE FACTS

THE MILITARY ARRANGEMENT

On August 4, 1944, an American Flying Fortress, the crew of which consisted of three Second Lieutenants and four Sergeants,¹² crashlanded on the Northern part of the island of Borkum, on which the Germans maintained a seafortress. The seven airmen, one of whom, not identified by name, but referred to in the record as "the small flier," emerged safely from the wreck and surrendered to a group of German soldiers who brought them to the nearest military installation, the "Eastland Battery," of which First Lieutenant Seiler was the commanding officer.¹³ The processing of the prisoners was handled by Seiler,¹⁴ however, mostly in the presence and in consultation with the highest ranking officer on the island, Naval Captain Goebell.

⁸ See: 2d edition of HYDE, *INTERNATIONAL LAW*, Vol. III, pp. 1822-1836; Lauterpacht's 7th edition of OPPENHEIM, *INTERNATIONAL LAW*, Vol. II, pp. 516-530; PHILLIPS, *Air Warfare And Law*, 21 GEORGE WASHINGTON L. REV. pp. 311 et seq., 395 et seq.

⁹ See ALBRECHT, *War Reprisals in the War Crimes Trials and in the Geneva Convention of 1949*, 47 AMER. JOUR. OF INTERNAT. L., pp. 590 et seq.

¹⁰ GENEVA PRISONERS OF WAR CONVENTION OF 1929, Article 2.

¹¹ Article 2 Section 3 of GENEVA PRISONERS OF WAR CONVENTION OF 1929. See also Article 13 Section 3 of GENEVA PRISONERS OF WAR CONVENTION OF 1949.

¹² Named in the record as follows: W. Lambertus, William J. Meyers, James W. Danno, William P. Dold, Hervey M. Walthall, Kenneth Faber, Howard S. Graham.

¹³ The complement of the sea fortress consisted of both navy and army personnel. The highest ranking officer was Naval Captain Goebell. Next to him, in military rank, was "Fregate" Captain Krolikowski, a naval officer commanding the "Flak Battalion" to which the three Batteries stationed on the island belonged. His Adjutant was First Lieutenant Wentzel. Among his other subordinates were First Lieutenants Seiler and Weber, each of whom was the commanding officer of one of the Batteries.

¹⁴ There was some evidence to the effect that Seiler had been gruff with the prisoners and had had a cigarette knocked from the mouth of one of them.

It is important to mention that the officer next in rank to him, "Fregate" Captain Krolkowski, took no part in this initial phase of the incident. He entered the picture only at a rather late stage of the tragic development. But his Adjutant, First Lieutenant Wentzel, who had some command of the English language, was called from his office to function as interpreter in the interrogation of the Americans.

According to applicable regulations, the prisoners had to be turned over to a military unit located in a naval port installation on the southern part of the island, from where they were to be routed to a collection point on the mainland of Germany. The particular manner in which this apparent routine procedure was carried out, reveals the vicious scheme of the military wire-pullers to encourage the populace of the town of Borkum to acts of violence against the prisoners and to leave the latter without any protection against such "voluntary" outbursts. It was military routine that a seven men guard detail, including two Sergeants one of whom, Schmitz, was to be in charge, was formed to escort the Americans on their march to the naval port.¹⁵ But among the instructions given to this detail, when it was briefed by Seiler, were the following: The prisoners must not be protected against any attacks by civilians. They must at all times during their march be compelled to keep their hands above their heads. They must be brought to the seaport on a specifically prescribed route, which happened to be the longest one among three available ones, and which was ominously characterized by the fact that it was meandering through the traffic lines of the town of Borkum.¹⁶

It is in connection with the last-mentioned instruction that Wentzel, whose assigned function as interpreter had terminated with the end of the interrogation of the prisoners, became deeply involved in the following development. When it appeared that Schmitz was unfamiliar with some of the street names mentioned by Seiler in describing the route to be followed, Wentzel, with Seiler's acquiescence, volunteered to accompany the escort on his bicycle in order to assist them in keeping to that route, part of which he had anyhow to cover to report to his superior, Krolkowski.¹⁷

COORDINATION OF CIVILIAN AUTHORITY

Hardly had the fateful march of the prisoners begun, when both the police chief of the town of Borkum, Rommel, and the town's Acting Mayor, Akkermann, were

¹⁵ The distance was about seven miles. And since both railroad and motorcar transportation would have been available, one of the issues in the trial was whether the order to cover that distance on foot was due to innocent motives, as claimed by the defendant Goebell, or part of the vicious scheme manifest from other instructions, as charged by the prosecution.

¹⁶ The testimonies of Goebell and Seiler were conflicting as to whether all those three instructions had been given by Seiler with specific authorization by Goebell, as Swiler claimed, or whether the instruction concerning the route had been given without such authorization, as Goebell claimed. And Wentzel, as part of his defense, claimed that when he offered to show the route, he had heard only two of those instructions, but had not heard the one prescribing that the prisoners should not be protected against attacks by civilians.

¹⁷ Conflicting positions were taken by the defendants Schmitz and Wentzel as to whether according to applicable military principles Wentzel, as long as he accompanied the escort, because of his officer rank, was in charge of the detail, or whether, despite Wentzel's presence, Schmitz, although only a Sergeant, remained in charge. Actually on various occasions during the march, orders were given by Wentzel and followed by the detail.

called to the phone, the first one by Goebell in person, Akkermann by Goebell's Adjutant. In each of the two phone conversations, notice was given of the arrangement for the march of the prisoners through the town, specific reference made to the "decree" of Dr. Goebbels, and the request expressed that "since this was a purely military matter", the civilian authorities should not interfere. Different as the characters and political attitudes of those two men were, were their reactions to that request for cooperation.¹⁸ Rommel passed the buck to his immediate superior, a Gestapo Commissar, who directed him that the police should keep hands off and let the military handle the affair as they pleased. Strictly living up to this parole, Rommel and his subordinates played the policy of the ostrich until all of the prisoners were dead. Akkermann, however, did not look for advice what to do. He immediately and enthusiastically caught on when he received the message from military headquarters. The first thing he did was to get Rommel on the phone and make sure that the latter would comply with the "decree" of Dr. Goebbels. In a similar vein he spoke to one Meyer-Gerhards who was acting chief of a uniformed organization which was called "Air-Raid Police", but was different and independent from the security police headed by Rommel. And even before he got Meyer-Gerhards in person on the phone, he informed the phone operator of that organization, Mammenga, of the forthcoming event and expressed the hope that on this occasion the men of the Air-Raid Police would show the prisoners "what kind of guys they were."¹⁹ He invited two persons of his immediate entourage to come with him to the spot where he would wait for the event, intimating to them that they should take part in the assaults to which he looked forward.²⁰ A speech inciting to assaults against the prisoners, which was made by him in a public place, is referred to in the further course of this summary.

PRISONERS LEFT UNPROTECTED AGAINST NUMEROUS ASSAULTS

In accordance with this conspiracy between military and civilian authority, the prisoners were left unprotected against assaults by civilians attacking them while they were marching through the town. But the first major action of violence against them occurred before they had entered the town. They had left the beach at a point where a detachment of conscripted laborers was about to disband after a practice exercise, and they had just entered an intersection leading into the town, when after a short conversation between the commander of that detachment and Wentzel, they were ordered to turn back and to continue marching along the beach, until the next intersection should be reached.²¹ The effect of the carrying out of this order

¹⁸ Rommel was a meek character and had climbed on the bandwagon of the Nazi party at a late period of the regime and only under pressure. Akkermann was a forceful man of highly emotional temper and one of the earliest members of the party, whose local boss he had been since 1932.

¹⁹ Meyer-Gerhards, although a subordinate of Akkermann, did not yield to the latter's influence, but maintained on the fateful day an attitude that earned him his acquittal in the trial. But two men of the Air Raid Police, including Mammenga, were among those who assaulted the prisoners.

²⁰ Those two men, one of whom was his brother-in-law, then actually participated in the assaults against the prisoners.

²¹ In this defense, Wentzel claimed that this order was not motivated by any malicious intent, but had to be given since not the intersection originally entered, but the next one was on the prescribed route.

was that the prisoners had to pass between two lines, which the members of that labor group had meanwhile formed, and that they received from them beatings while so passing—a regular gauntlet. There was evidence that Wentzel, if he had not taken active part in the arrangement of this improvisation, at least saw and tolerated it,²² as did the members of the guard detail.

The next major scene of violence against the prisoners was a street corner in the town where Akkermann was waiting for them. It was on this occasion that he made an inflammatory speech to the crowd gathering there, using such words as “beat the dogs, the murderers.” Numerous civilians attacked the prisoners, while others inspired such attacks by shouting: “Knock them down, kill them, they kill our brothers, sisters, and children.” All this was witnessed, and acquiesced in, not only by Wentzel and the guard detail, but also by another German officer, First Lieutenant Weber, who had volunteered to bicycle along with Wentzel at the head of the fateful procession, when he had seen it from the window of his billet, had become curious, and had been given a short explanation by Wentzel.

It would be beyond the space limitations of this paper to describe the numerous other occasions on which the prisoners were assaulted in the town by civilians.²³ It must be mentioned, however, that the guards not only failed to protect their charges, but were roughly handling them when from physical exhaustion they did not keep in step during the march or relaxed in their compliance with the order to keep their hands above their heads. Rifle butts were frequently used on such occasions. Particularly cruel toward them were the two Sergeants, and especially Schmitz. And the fact must be singled out that the vicinity of the Town Hall, which subsequently became the scene of one of the most violent attacks against the prisoners, would have been avoided, had a suggestion of the lead guard, made while the procession was at some distance from that vicinity, been accepted. This suggestion was to take a short cut to the port instead of further continuing the prescribed route through the main traffic arteries of the town. It was flatly rejected by Wentzel who insisted that the instructions announced by Seiler must be strictly obeyed.

PRISONERS SHOT TO DEATH

Almost from the beginning of the tormenting march, the small flier had a particular problem added to the miserable condition in which all of them were. His trousers had slipped down and he was not allowed to fix them since to do this he would have had to take down his hands temporarily, and the orders required that he keep them above his head throughout the march. Attempts of the two guards who in succession were assigned to this prisoner, to allow him to adjust his trousers, were frustrated by Wentzel's insistence, also on this occasion, that the instructions received must be strictly followed. Finally, in the course of the assaults to which the prisoners were

²² According to his own testimony, he had neither actively participated in arranging for, nor witnessed that gauntlet. In the latter respect he claimed that he had bicycled ahead of the escort and thus not been able to see what took place behind his back, as it were.

²³ The defendant, Heinemann, was charged by the prosecution as one of the civilians who assaulted the prisoners, but the evidence was conflicting on this point. Testimonies that Weber was identical with a German officer who on two occasions had incited civilians to beat prisoners, were of dubious nature.

exposed in the vicinity of the Town Hall, the small flyer collapsed, probably after being hit by the Air Raid Police man Mammenga.²⁴ Schmitz ordered the column to march on, thus abandoning the prisoner lying on the ground to his own fate.²⁵ Shortly thereupon a man in military uniform, later identified as a Private First Class Langer, who was then off duty, suddenly rushed out of the crowd, took aim and shot at the prostrate prisoner, inflicting a deadly wound. Before this triggerhappy man had pulled out his gun, he had shouted that his wife and child had been killed in Hamburg, when that city was bombed, and that he was to be their avenger. While first aid was extended to the victim in the nearby office of Meyer-Gerhards, Langer offered a "mercy shot." He was told to get out, but no move was made toward his apprehension. An ambulance brought the wounded American to the Navy Hospital where he passed away immediately after receiving the first medical attention.

The ordeal of the six other prisoners went on as they continued their march to the port and were further exposed to physical mistreatments and humiliations. And when they finally were at a short distance from the naval port, all of them were almost simultaneously shot to death. Unquestionably, Langer, who had murdered the small flier, was also the initiator and the main, although probably not the sole, perpetrator of this final carnage. He himself boastfully claimed to have killed all six of them. The prosecution charged, however, and with strong circumstantial support, that the two Sergeants in the guard detail, including Schmitz, had taken active part in that second murderous shooting.²⁶

The seven victims were buried in the Lutheran cemetery of Borkum, with true name disks attached to their graves. Upon exhumation of, and autopsy performed on, their bodies in the course of the pre-trial investigation, it was established by medical evidence that the shot wounds had been the sole cause of their deaths, despite the still visible injuries they had received during the various other assaults. It would therefore seem to be certain, or at least highly probable, that the six of them who had almost reached the terminus, would have survived the tormenting march, and possibly even the war, had arrest of Langer after the first shooting incident prevented him from initiating the second one, or if after the first shooting incident proper precautions had been taken for the safety of the six prisoners still in jeopardy. In this connection, and in view of the nature of the prosecution's charge against Krolkowski, it is important to mention the following facts.

Krolkowski, who had had no part at all in the original arrangement, was informed about the march of the prisoners only when it had reached the vicinity of the Town Hall, which was also that of his headquarters. And he learned about the orders given

²⁴ Mammenga, who had admitted this in his pre-trial affidavit, on the stand claimed that he had hit another prisoner, not the small flier.

²⁵ Schmitz testified to have done this on specific instructions by Wentzel, but according to Wentzel's testimony the latter, even before the group had reached the Town-Hall, had severed from it and ridden ahead, on his bicycle, to report to Krolkowski.

²⁶ The American Major, who had conducted the Army's pretrial investigation of the case, expressed the belief, as witness before the court, that part of the shooting at the six prisoners had been done by the two Sergeants in the guard detail. But his written investigation report, submitted prior to the trial, contained a different conclusion, namely that all the six had been shot to death by Langer alone.

to the guard detail only shortly after the collapse of the small fier. He was extremely shocked and alarmed and spoke over the phone with Goebell, most probably to have the latter go back on the orders. Goebell made a reply which can hardly have been understood otherwise than as a denial to do anything of the kind.²⁷ Krolkowski then took the initiative into his own hands, but by "too little and too late." He dispatched one Captain Sobiech to look after the prisoners and to report back, and when Sobiech did not return after a short time, dispatched also Wentzel and Weber with the same mission. However, the bloody deed had been performed before Sobiech reached the prisoners, whom he saw only as dead bodies lying on the ground, each with a bullet wound in his head. And, of course, the same was seen by Wentzel and Weber, when they subsequently appeared on the premises.²⁸

OFFICIAL REPORT CONCEALS SHOOTING FACTS

After the unhappy end of the prisoners' tragedy, Akkermann did nothing to disclaim the role he had played in the development, rather attempted to justify it as reprisal for the killing of civilians by Allied bombers, an attitude which he generally maintained even as a defendant in the trial. Goebell, however, made immediately after the incident an attempt to discharge the military from any responsibility by studied efforts to partly confuse and partly suppress the true facts. Thus he blamed Rommel for the failure to take preventive police measures, claiming that by his phone conversation with Rommel he had intended to alert the police, but not to put it out of action.²⁹ He gave order to those under his command not to mention the incident in outgoing correspondence. He did nothing toward the arrest of those who were suspected of having killed the prisoners, although immediately after the incident Langer's involvement therein was a matter of common knowledge in Borkum, coupled with a rumor that a Sergeant had participated in the shooting against the prisoners. Finally, and most importantly, with his approval, if not upon his order, an official memorandum was drawn up wherein no mention at all was made of the shootings, or of Langer, but wherein the death of the prisoners was attributed to beating assaults by civilians as the sole cause.³⁰ This memorandum which, on Krolkowski's request, was prepared by Wentzel, and signed by all the members of the guard detail, was submitted, by Goebell, to the Admiral who was his superior, as basis of an official report on the incident.³¹ Thereby the affair was closed, so far as the Germans were concerned.

²⁷ Goebell's short and cool reply was in about the following words: "I can't do anything." In his defense, he claimed that this did not mean that nothing should be done, but that because of the distance of his headquarters from the scene of the events, he was practically unable to do anything, so that Krolkowski, being close to the premises, had himself to make whatever disposition might be necessary.

²⁸ This would seem to refute Wentzel's contention, in his defense, that at the time he participated in the making of the false memorandum, which will soon be mentioned, he was unaware of the fact that shot wounds were the cause of death of the six prisoners whose bodies he had seen.

²⁹ Rommel, in his naiveté, believed this, felt deep remorse, and attempted suicide by jumping into the open sea.

³⁰ If Goebell did not order this false memorandum to be made, he ratified it by submitting it to his superior, as will be seen soon.

³¹ Patently untruthful were the testimonies of Wentzel and Krolkowski that, at the time of the

III. TRIAL

Shortly after the island of Borkum had come under British occupation regime, an intelligence report on the incident reached the U. S. Naval Liaison Officer attached to the British Flag Officer for Western Germany. With the assistance of British personnel, he made a summary investigation which was followed up by a more elaborate investigation conducted by a U. S. Army Intelligence Corps team. The final upshot was a war crimes trial before one of those "American Military Government Courts", which were actually military commissions, and whose general organization and rules or procedure, different from those in the Nuremberg trials, have been described by this writer on a prior occasion.³² In the particular case it was composed of seven field grade officers, partly full Colonels, partly Lieutenant Colonels, none of whom had had legal training.³³ Its jurisdiction was challenged by the defense on the ground that with regard to the defendants who had been German officers or soldiers at the time of the incident, the composition of the tribunal and the procedure which it was supposed to apply were in violation of the Geneva Prisoners of War Convention of 1929 which provided that "sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."³⁴ But this objection was rejected as it had been in a prior case,³⁵ and in accordance with an opinion of the U. S. Supreme Court announced shortly before the Borkum Island trial.³⁶

The prosecution was in a fair, although occasionally passionate, way conducted by a team of Army officers headed by a Lieutenant Colonel. Both American and German defense counsel were assigned, as the first ones three officers each of whom had had legal training,³⁷ as the second ones seven German attorneys at law. Each of the American counsel had to defend one of the three groups of accused officers, soldiers, and civilians. Each of the German attorneys was assigned to one defendant indi-

preparation of that memorandum, they did not know that the prisoners had been murdered by shot-wounds, and Goebell's testimony that at the time when he submitted the memorandum to the Admiral, he did it in similar unawareness of the true facts.

³² Op. cit. supra note 2.

³³ No objection was raised on this ground, although the applicable regulations prescribed that at least one member of a Military Government Court had to be an officer with legal training. On review of the judgment, the shortcoming was noticed, but held not to have prejudiced the defendants. This was based on the highly questionable ground that the regulations prescribed merely the presence, in the tribunal, of a legally trained officer, but did not assign to him any specific function.

³⁴ Article 63 of the GENEVA PRISONERS OF WAR CONVENTION OF 1929. See also articles 85 and 102 of the GENEVA PRISONERS OF WAR CONVENTION OF 1949.

³⁵ Trial of General Dostler by an American military commission in Rome, United Nations War Crimes Commission, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Vol. 1, pp. 22, 29 et seq.

³⁶ In re Yamashita, 327 U.S. 1. This ruling was reaffirmed in Johnson v. Eisentrager 339 U.S. 763. To same effect: judgments of International Military Tribunal for the Far East (Tokyo Trial), official trial transcript, pp. 27, 28, and in High Command case, United Nations War Crimes Commission, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Vol. 12, pp. 1, 63. Arguments pro and con discussed in op. cit. supra note 2, pp. 47-49.

³⁷ At least two of them were admitted to practice of law in their respective home states.

vidually. Moreover, an American Major was charged with the duty to coordinate American and German defense counsel. Conscientious efforts to comply with their duties were made by all those engaged in the defense of the accused.

A written accusation, styled "charge sheet," consisting of an English original text and a translation of it into German, named 23 persons, and others with unknown names and whereabouts, as the perpetrators of the crimes, and gave names of the seven victims. It contained two counts, murder and assault, although, technically and in terms of the charge sheet, the perpetration of war crimes was the essence of the accusation, murder and assault being charged merely as the particular manner in which the war crimes were alleged to have been committed. Both counts were couched in most general language. There was merely the omnibus statement that the accused had on or about August 4, 1944, "wilfully, deliberately, and wrongfully, encouraged, aided, abetted, and participated" in a violation of the laws of war by the killing of and by assault upon the named seven persons who were then "surrendered prisoners of war in the custody of the then German Reich."³⁸

Only fifteen of those accused by names were arraigned and tried. This number did not include such key figures as: Langer; Haesicker, the commander of the labor detachment which had committed the first major assault against the prisoners; Wittmaack, the Sergeant in the detail who was next to Schmitz in cruelly handling the prisoners and who was also suspected of having participated in the second shooting.³⁹ Only few of those numerous civilians who had assaulted the prisoners could be identified and only two of them brought to trial: Mammenga and Heinemann.⁴⁰ The defendants tried were five officers, Goebell, Krolkowski, Wentzel, Weber, Seiler; five of those who had been members of the guard detail, Schmitz, Pointner, Albrecht, Geyer, Witzke; and five civilians, Akkermann, Rommel, Meyer-Gerhards, Mammenga, Heinemann.

The trial, the official language of which was English, was actually a bilingual one, since everything which was said in English was immediately translated into German, and vice versa. It was public, and regularly attended by American and German press reporters and by relatives of the accused. The Star Spangled Banner was constantly displayed as symbol of the exercise of American occupation authority. The procedure was throughout orderly, quiet, and dignified. Its form was, however, surprising to German observers, as well as to the defendants and their German counsel, because it generally followed the Anglo-American pattern of a criminal trial which is in essential respects different from the corresponding features of a criminal trial in a civil law country.⁴¹ And American defense counsel were disappointed by the fact

³⁸ The defense did not raise an objection because of this lack of specification, nor did it make a request for specification.

³⁹ In the case of only of those not brought to trial, this was due to the fact that his innocence had been clearly established prior to the trial, though subsequently to the written accusation. The others were not tried either because they were dead or because they could not be apprehended.

⁴⁰ With regard to Heinemann, see note 23, *supra*.

⁴¹ But as a concession to the practice customary in civil law countries, the defense, and not the prosecution, had the final argument. For a short discussion of differences between the form of criminal trials in common law and civil law countries respectively, see *op. cit. supra* note 2, pp. 62-64.

that despite the Anglo-American form of procedure, the Anglo-American exclusionary rules of evidence, including the hearsay rule, were inapplicable pursuant to specific regulations.⁴² Since so much has been written about this general feature of the war crimes trials, only two related specific objections which were raised in the Borkum Island case will be mentioned here. On the basis of the previously cited Article 63 of the Geneva Prisoners of War Convention,⁴³ it was claimed that the military defendants were also with regard to rules of evidence entitled to equal treatment with American defendants in court martial trials, an objection which was rejected on the same ground as the similar one addressed to the jurisdiction of the tribunal. And on behalf of those defendants who, on the stand, disclaimed the truthfulness of certain parts of their pre-trial affidavits, the objection was raised, unsuccessfully, that the admission in evidence of their affidavits was unduly prejudicial to them since they were not allowed to testify under oath,⁴⁴ thus could not under oath refute their sworn written statements.

IV. JUDGMENT, REVIEW, AND OTHER POST-TRIAL ACTIONS

As in other trials of the same group,⁴⁵ the judgment consisted only of verdicts of guilty or not guilty, and of the sentences imposed on those declared guilty, but with no reasoning or statement of specific findings attached. It was a very severe one, both as to guilt and sentences. Only Meyer-Gerhards was acquitted on both counts. The other accused were found guilty, most of them only on the assault count, but Goebell, Seiler, Wentzel, Schmitz, Akkermann, also on the murder count. Those five were sentenced to death by hanging. Imprisonment was imposed on Krolikowski for life, on Weber for 25, Mammenga for 20, Heinemann for 18, Witzke for 11, Albrecht for 6, Pointner for 5, Geyer for 4, and Rommel for 2 years. According to established procedure,⁴⁶ this judgment could go into effect only to the extent as it was approved by the highest military commander of the occupation zone, who made his decision after an elaborate review of the record by several members of the Judge Advocate Staff, supposed to submit a summary of the facts along with an opinion as to approval or disapproval of convictions and sentences. The result of their recommendations was disapproval of Rommel's conviction, but approval of all the other convictions and sentences, except for Heinemann's term of imprisonment which was reduced from 18 to 10 years. But in favor of Goebell and Seiler, further action was subsequently taken, commuting their death sentence to life imprisonment.

Petitions in the nature of applications for writs of habeas corpus were submitted directly to the U. S. Supreme Court by Seiler and Wentzel, but denied consideration

⁴² See *op. cit. supra* note 2, pp. 69-76 ("Dachau law of evidence"), p. 43 note 110 (rule applied in Saboteurs Case), and p. 107 (corresponding rule established for military commissions trying war criminals).

⁴³ See note 34, *supra*.

⁴⁴ *Op. cit. supra* note 2, pp. 65, 66.

⁴⁵ *Op. cit. supra* note 2, p. 29.

⁴⁶ *Op. cit. supra* note 2, pp. 67-69.

of their merits.⁴⁷ Seiler's death sentence was commuted to life imprisonment, as mentioned before. The death sentences of Wentzel, Akkermann and Schmitz were on different days executed in the Landsberg prison, long after the judgment had become final, and with much hesitation and more than one suspension of the execution in the case of Wentzel. Most of the prison sentences were not fully served, however, partly because of the establishment of a system of credit for good conduct, partly as the result of additional review procedures.⁴⁸ Prior to this writing, all of those detained in the Landsberg war crimes prison because of conviction in the Borkum Island case, had successively been set at large, some of them only on parole. As the last of them, Goebell was released on February 21, 1956, pursuant to a unanimous recommendation of the Mixed Board set up under Chapter 1, Article 6, of the Convention on the Settlement of Matters Arising out of the War and the Occupation, concluded between the three Western Allied Powers and the Federal Republic of Germany.⁴⁹

V. CONCLUSIONS

Numerous problems of fact and law were placed before the tribunal by the final arguments. Generally, prosecution and defense counsel, but sometimes counsel of defendants with conflicting interests, stood at opposite sides of the respective issues. As mentioned before, the judgment, apart from imposing sentences, contained only a bare answer to the question of guilt on charges which were not specified, but com-

⁴⁷ In the Matter of Jakob Valentin Seiler, 334 U.S. 826; In the Matter of Erich Wentzel, 335 U.S. 805. For precedent established by decision on similar petition made on behalf of those convicted in the Malmedy Massacre case, see *Everett v. Truman* 334 U.S. 824. While in the foregoing cases, where the petitions had been filed directly with the Supreme Court, its lack of original jurisdiction was the technical ground for the denial of the requested relief, in a subsequent case, on review of an intermediate decision in favor of the petitioner, *Eisenrager v. Forrestal* 174 F.2d 961, reversal and denial of relief was by the Supreme Court placed on the ground that an enemy alien who had never been a resident of or even present in the United States, had been captured and held a prisoner of war outside American territory, and convicted and sentenced by an American military commission for a war crime committed outside the United States, was not entitled to apply to an American federal court for a writ of habeas corpus. *Johnson v. Eisenrager* 339 U.S. 763. See also FAIRMAN, *Some New Problems of the Constitution Following The Flag*, 1 STANFORD L. REV. pp. 587 et seq.; PERLMAN, *Habeas Corpus and Extraterritoriality: A Fundamental Question of Criminal Law*, 36 AMER. BAR ASS. JOUR. pp. 187 et seq.; DAYTON, *A Critique of the Eisenrager Case*, 36 CORNELL L. QUART. pp. 303 et seq.

⁴⁸ On recommendation by a War Crimes Modification Board, established by American military authority in November, 1949, the original terms of imprisonment were reduced for Krolkowski from life to 10, for Weber from 25 to 10, for Witzke from 11 to six years. And on recommendation by a Mixed Parole and Clemency Board, consisting of three Americans and two Germans, set up at Bad Godesberg in October, 1953, Seiler was released on parole. Following recommendation of the same Board, Goebell's sentence was in August 1954 reduced to 32 years, and in September 1955, to 28 years.

⁴⁹ BONN AGREEMENTS of 1952, as Amended by the Paris Protocol of 1954, Document No. 11, 84th Congress, 1st Session, pp. 77, 81, et seq. The Mixed Board is composed of six members, one of whom is appointed by each of the three Western Allied Powers, and three of whom are appointed by the West German Government. But only a unanimous recommendation by the Board is binding on the Power which imposed the sentence.

pressed in an omnibus accusation. It is therefore only to a very small degree patent from the judgment on what findings of fact the verdict was based and to what specific extent the tribunal found those whom it convicted as guilty. Nor is in each instance where a defendant was found guilty, the legal theory on which his conviction was reached disclosed by the mere fact of conviction, or conviction on one or both counts.

For instance, from the mere fact that Schmitz was convicted on both counts, and sentenced to death, no inference can be drawn as to whether or not the tribunal found that he too, and not only Langer, had shot at the six prisoners left after the murder of the small flier, since four other defendants, who certainly did not participate in any shooting or other direct assault against the prisoners, Goebell, Seiler, Wentzel, Akkermann, were also found guilty on both counts, and were also sentenced to death. Nor is it patent from the judgment on what ground Krolkowski was convicted, whether it was because the tribunal believed that after the first shooting incident he failed to take prompt and adequate measures for the protection of the other six prisoners, whether it was because of his participation in the fabrication of the false official memorandum, or whether it was on both grounds. Similarly latent is the theory on which Weber was found guilty on the assault count, whether it was because he failed to protect the prisoners when they were assaulted in his, as well as Wentzel's and Akkermann's, presence, or because two witnesses had identified him as the officer who on subsequent occasions incited civilians to beat prisoners, or whether it was on both grounds. And the conviction of Mammenga leaves the question open whether the tribunal believed or did not believe that the prisoner assaulted by him was the small flier.

Among the legal issues regarding which the position taken by the tribunal is not revealed by its verdict is the extent to which a defendant could be made criminally responsible for an act not directly perpetrated by him. It is a universally recognized principle of criminal law, governing the determination of guilt of an accomplice, that one who knowingly and willingly participates in a criminal design or undertaking is equally with the direct perpetrator or perpetrators responsible for any act in pursuance of that design or undertaking, or which is a natural or probable consequence of it, but only if it was committed after he became a participant to the scheme.⁵⁰ This falls short of the doctrine of American criminal law under which one who joins a criminal conspiracy is jointly responsible for any act of a coconspirator pursuant to the conspiracy, irrespective of whether such act was committed before or after he joined the common enterprise.⁵¹ The prosecution, in one of its final arguments, urged that this conspiracy doctrine was applicable in the case. In the writer's opinion it was not applicable, for the following reasons. To be sure, it is judicially established that American military commissions adjudicating war crimes were acting exclusively under American authority,⁵² and were thus national tribunals,

⁵⁰ *Op. cit. supra* note 2, p. 82.

⁵¹ *AMERICAN JURISPRUDENCE*, Vol. 11, p. 549; Wharton, 12th ed. of *CRIMINAL LAW*, Vol. 2, section 1657, footnote on p. 1933.

⁵² *Eisentrager v Forrestal* 174 F2d 961, disapproved on other ground in *Johnson v Eisentrager* 339 U.S. 763.

at variance with the International Military Tribunal in the first Nuremberg case, the courts in the so-called subsequent Nuremberg cases,⁵³ and the Tokyo tribunal in the case against the major Japanese war criminals.⁵⁴ But this does not mean that the substantive law to be applied by those commissions was American law. It was the international law of war crimes. Consequently, in determining the guilt of a defendant, only internationally recognized principles of criminal law could properly be applied, thus not the described conspiracy doctrine which is generally not part of the criminal law in civil law countries, as for instance France and Germany.⁵⁵

Other legal issues, on which adverse positions were taken in the arguments of prosecution and defense counsel respectively, were the applicability of the doctrine of command responsibility and of the defense of superior order. The first mentioned doctrine was announced by a majority of the Supreme Court in the noted case against the Japanese General Yamashita, was even there disapproved by forceful dissenting opinions,⁵⁶ and would seem to be applicable, if at all, only in such war crimes cases as present similar features to the one in which it was first applied. As to the second mentioned point, the general practice in the war crimes trials was to consider superior order not an absolute defense, but a mitigating circumstance at the most.⁵⁷ It should be mentioned, however, that in the subject case there was enough in the evidence to warrant an inference that most of the defendants on whose behalf the plea of superior order was raised, were not covered by it, even if it should otherwise have been applicable, since they acted in excess of what orders may have compelled them to do. And the fact that Rommel was given an extraordinary lenient sentence by the tribunal and completely acquitted on review, is perhaps solely, or at least mainly, explainable by the assumption that in his favor strong consideration was given to the circumstances that he almost mechanically, and probably against his own inclination, carried out what his superior had directed him to do.

In the writer's opinion, there was sound foundation, evidentiary as well as legal, for all the convictions on the assault count. And if the court, in the light of strong circumstantial evidence to this effect, found that Schmitz had taken an active part in the second shooting incident, his conviction on the murder count was a matter of course. It was probably also otherwise justified, namely on the theory that his position in the second shooting incident was at least that of an aider and abetter. But with regard to the other four found guilty on the murder count, the question is well debatable whether, even applying the conspiracy doctrine, there was enough in the evidence to justify their conviction not only on the assault count, but also as accomplices in the shooting against the prisoners. It is indeed arguable whether or not the spontaneous action of Langer, a soldier not belonging to the guard detail, in shooting at the prisoners, or the spontaneous action of Schmitz, in participating in the shooting, were acts pursuant to the conspiracy to expose the prisoners to, and not to protect them against, assaults by civilians, or acts com-

⁵³ *Flick v Johnson* 174 F2d 903, certiorari denied in 338 U.S. 879.

⁵⁴ *Hirohita v MacArthur* 338 U.S. 197.

⁵⁵ Cp. Keenan and Brown, *CRIMES AGAINST INTERNATIONAL LAW*, pp. 88 et seq.

⁵⁶ *In Re Yamashita*, 327 U.S. 1. See also *op. cit. supra* note 2, pp. 82, 83.

⁵⁷ *Op. cit. supra* note 2, pp. 83-93.

pletely independent from the conspiracy. It is also arguable whether or not those shootings were a naturally or probably foreseeable consequence of that nefarious scheme, in terms of the general law on criminal participation mentioned before.

As to the sentences, the writer feels that most of those imposed by the tribunal on defendants found guilty only on the assault count may have been too severe. And he definitely believes in the excessiveness of the life sentence originally meted out to Krolkowski, whose conviction can hardly be rationalized otherwise than in a highly technical way, not related to moral delinquency on his part. No position is taken herewith as to whether any of the death sentences, or all of them, should have been executed. But the selection of Goebell and Seiler as those given the benefit of commutation, appears highly questionable in view of the fact that those two, as the writer sees it, were the wirepullers of the atrocious incident. Of course, nothing herein is meant to deny or to question that all those who had to make decisions in the case discharged their duties in a most conscientious way, with the honest intention to find the truth, to be just, and to be fair.